

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

STATE OF NEW JERSEY, .
Plaintiff, . Case No. 2:23-cv-3885
vs. . Newark, New Jersey
September 27, 2023
UNITED STATES DEPARTMENT OF .
TRANSPORTATION, ET AL, .
Defendants. .

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE LEDA D. WETTRE
UNITED STATES MAGISTRATE JUDGE

APPEARANCES (the parties appeared via teleconference)

For the Plaintiff: RANDY M. MASTRO, ESQ.
King & Spalding, LLP
1188 Avenue of the Americas
34th Floor
New York, NY 10036
212-827-4019
rmastro@kslaw.com

JESSICA BENVENISTY, ESQ.
King & Spalding, LLP
1188 Avenue of the Americas
34th Floor
New York, NY 10036
212-790-5328
jbenvenisty@kslaw.com

Audio Operator:

Transcription Service: KING TRANSCRIPTION SERVICES, LLC
3 South Corporate Drive, Suite 203
Riverdale, NJ 07457
(973) 237-6080

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1 (APPEARANCES continued)

2 For the Plaintiff: LAUREN MYERS, ESQ.
3 King & Spalding, LLP
4 1188 Avenue of the Americas
5 34th Floor
6 New York, NY 10036
7 212-790-5379
8 lmyers@kslaw.com

6 For the Defendant:

7 GREGORY M. CUMMING, ESQ.
8 United States Department of
9 Justice Environmental and Natural
10 Resources
11 Division Natural Resources Section
12 P.O. Box 7611
13 Washington, DC 20044
14 202-305-0457
15 Gregory.cumming@usdoj.gov

12 SHARI HOWARD, ESQ.
13 United States Department of
14 Justice Environmental and Natural
15 Resources
16 Division Natural Resources Section
17 P.O. Box 7611
18 Washington, DC 20044
19 202-598-9407
20 Shari.howard@usdoj.gov

17 SAMANTHA G. PELTZ, ESQ.
18 United States Department of
19 Justice Environmental and Natural
20 Resources
21 Division Natural Resources Section
22 P.O. Box 7611
23 Washington, DC 20044
24 202-353-5959
25 samantha.peltz@usdoj.gov

22 SHARON VAUGHN-FAIR, ESQ.
23 Federal Highway Administration
24 711 W. 40th Street
25 Baltimore, MD 21211
410-9622544

1 (Commencement of proceedings)

2 THE COURT: Good afternoon. We are on the
3 record in State of New Jersey v United States
4 Department of Transportation, et al, 23 civil 3885.

5 This is Magistrate Judge Wettre. I'm the assigned
6 magistrate judge on the case. And I'm convening the
7 case for a status conference.

8 So, may I have appearances of the
9 plaintiffs, please.

10 MR. MASTRO: Yes, Your Honor. Randy Mastro
11 of King and Spalding for the State of New Jersey. I'm
12 here with my colleagues, Jessica Benvenisty and Lauren
13 Myers. But I will be doing the speaking today.

14 THE COURT: Okay. Good morning to -- good
15 afternoon to all of you.

16 MR. MASTRO: Thank you.

17 THE COURT: And for the defense.

18 MR. CUMMING: Good afternoon, Your Honor.

19 This is Gregory Cumming on behalf of Federal
20 defendants. And with me are my colleagues Shari
21 Howard and Samantha Peltz along with Sharon Vaughn-
22 Fair from the Federal Highway Administration.

23 THE COURT: Okay. I think I had one other
24 person. Do we have Elizabeth Nower (phonetic). I'm
25 -- I have that on my appearance sheet.

1 UNIDENTIFIED FEMALE: Your Honor, I'm just
2 attending as a member of the public.

3 THE COURT: Oh, I'm sorry. Okay. You were
4 -- you were in the wrong spot on my appearance sheet.
5 And of course, you're welcome to -- to listen in.

6 All righty. So, you know, just by way of
7 background. I believe they were filed on the docket.
8 I have -- I don't have the banner on the top. But I
9 -- it does say via ECF on both letters.

10 I have the September 15th letter from
11 plaintiff's counsel. And a September 18th response
12 from the government. Is there anything else that I'm
13 missing? Anything recently filed for instance?

14 MR. MASTRO: No, Your Honor.

15 THE COURT: Oh, okay. And I know that Judge
16 Martinotti, the district judge had set it up where
17 you're anticipating he would have the initial status
18 conference after the defense entered notices of
19 appearance.

20 You know, just by way of internal
21 operations. I'm the one handling it. And -- and he's
22 aware that I'm having the conference. So, you know, I
23 certainly would like to get the case moving. And it
24 seems like the initial issue is when the
25 administrative record will be produced.

1 I see you have a discrepancy in -- in your
2 request as to the deadline for doing so. And I wanted
3 to look under the hood a little bit just to see -- to
4 get a sense from the defense of what's involved in --
5 collecting it.

6 Because I -- I agree that -- and I think
7 both sides agree that the briefing can't really occur
8 until the administrative record is produced.

9 So, let -- let me hear first from the
10 government on that. And the -- the federal
11 government.

12 MR. CUMMING: Thank you, Your Honor. So, to
13 give the Court a little bit of background into this
14 type of case. Plaintiff's lawsuit is primarily one
15 under the National Environmental Policy Act which I'll
16 call NEPA which is a procedural statute that requires
17 an agency to conduct analysis of the environmental
18 impacts of a major federal action.

19 That analysis is typically presented in a
20 document such as an environmental assessment or an
21 environmental impact statement.

22 Here, we're talking about an environmental
23 assessment, what I'll call an EA, which is then
24 followed by a federal decision which is here, a
25 finding of no significant impact.

1 As the Court correctly noted, the briefing
2 here will be based on the administrative record. So,
3 it is, you know, crucial to the case. The record in
4 EPA cases is everything relevant and nonprivileged
5 that the agencies directly or indirectly relied on in
6 reaching its decision.

7 The record here is, I think, potentially
8 pretty voluminous. It's not only the final
9 environmental documents, but publically available
10 drafts, public comments, agency communications and the
11 communications with, you know, extra agency sources
12 such as state governments or other interested parties.

13 The agency -- I think the complaint was
14 filed on -- at the end of July and service was
15 perfected shortly thereafter. The agency's been
16 working as expeditiously as it can to collect the
17 universe of materials. And is currently in the
18 process of reviewing them.

19 But that review includes not only sort of
20 privilege review, but ensuring that the agency
21 excludes deliberative materials and then prepare --
22 and irrelevant materials and then preparing the -- the
23 record for production.

24 And simply put, that process takes time
25 given the agency staff involved have other

1 responsibilities. They're not, you know, solely
2 detailed to -- to preparing the record.

3 THE COURT: Let me -- let me ask you
4 something. When -- when you ordinarily produce the
5 administrative record, do you Bates Stamp it?

6 MR. CUMMING: Yes, Your Honor.

7 THE COURT: Okay. So, is -- is there an
8 order in which you -- you normally Bates Stamp it?
9 And where I'm going with this is, the possibility of a
10 rolling production. At least of the information
11 that's already collected.

12 MR. CUMMING: Well --

13 THE COURT: Unless there's some significance
14 to the order in which you produce the information.

15 MR. CUMMING: Typically, Your Honor, the --
16 the -- the record is produced as a -- as a whole file.
17 Not -- not in a rolling matter.

18 I will note -- I mean, in many of the I
19 would say the key documents here, the final
20 environmental assessment. Those are already
21 publically available. They were -- they were
22 publically released upon being finalized, you know,
23 notices published in the federal registers.

24 So, to the extent its sort of core materials
25 are something that plaintiffs need to have sooner. I

1 think they already have a great majority of that
2 information.

3 THE COURT: But, you know, other than its
4 ordin - it's ordinary for the government to produce
5 the administrative record in -- in one fell swoop,
6 what would be the prejudice of, you know, starting a
7 rolling production immediately?

8 MR. CUMMING: I think, Your Honor, my
9 concern, and this is not having talked to the
10 agencies. So, my -- my concern would be that some of
11 the -- there could certainly be, I suppose, an initial
12 production of those documents that are already
13 publically available.

14 But the remainder of the documents that are
15 internal communications, I -- I think that -- that
16 production would need to happen all at one time given
17 sort of decisions as to privilege and other -- and
18 deliberative issues would need to be looked
19 holistically in terms of, you know, seeing what
20 communications were publically released. What was
21 sent outside the agency versus, you know, internal
22 communications.

23 And I think those calls would have to be
24 made in a group. So, I -- I guess I -- Your Honor,
25 we're certainly open to considering the -- the rolling

1 production. But I think it would need to be sort of
2 two stages. The first would be the -- the collection
3 of publically available information. And then the
4 second would be everything else.

5 THE COURT: All right. And what would
6 prevent you from putting sufficient resources on this
7 to have -- whether rolling or not rolling -- to have
8 the administrative record produced by October 20th as
9 requested by the plaintiff?

10 MR. CUMMING: I think frankly, I mean
11 Federal Highways has relatively limited resources --
12 as I -- I also think the Court is likely aware,
13 there's some potential government funding issues that
14 we may run into next week that are also, I think --

15 THE COURT: I'm not taking that on. Absent
16 that.

17 MR. CUMMING: I'm sorry, Your Honor.

18 THE COURT: Absent that occurring, what --
19 what would be impossible about producing the record by
20 October 20th?

21 MR. CUMMING: Ah --

22 THE COURT: The case has been on file for a
23 while already.

24 MR. CUMMING: I -- I understand that, Your
25 Honor. I mean, I think agency resources and the --

1 and the need to make a careful determination as to the
2 documents is the primary -- primary reason. I mean,
3 I'll -- I'll note Your Honor's pointed out.

4 I don't think our proposed November date is
5 outside the norm in either cases that have been filed
6 in this district or other districts around the
7 country. That -- that is, you know --

8 THE COURT: Well, there's no binding date
9 here in -- in this district. So, we have case
10 managers, namely magistrate judges, who decide what's
11 reasonable based upon the particular facts. And
12 that's what I'm implying.

13 So, it doesn't move me in the least what
14 other districts ruled on this. Because we have
15 tailored case management schedules here. So, okay.
16 I've got the gist of it. Let me hear -- let me hear
17 from plaintiff's counsel, Mr. Mastro.

18 MR. MASTRO: Thank you, Your Honor. Your --
19 Your Honor, you -- you got right to the core of it.
20 And he described the core materials in the
21 administrative record as largely public already.

22 That's why we suggested to Your Honor that
23 they start by giving us, if they feel so strongly it
24 should all be produced at one time. Start giving a --
25 he knows what the index of materials is.

1 So, that's why we suggested we get a draft
2 index of the administrative record by October 6th.
3 That gives us a snapshot, Your Honor, into not just
4 what's publically available, but where the issues
5 might arise about the sufficiency of the record.
6 Because that's going to be on issues like privilege
7 claims and deliberative process and all of that.

8 So, the index is a -- is a -- should be an
9 easy short form way to give us that window. And then
10 we --

11 THE COURT: May I ask you a question though?
12 If they haven't -- completed their privilege review by
13 October 6th, then how useful could the index be to
14 you?

15 MR. MASTRO: Your Honor, the index isn't
16 necessarily going to give us complete insight into
17 their privilege claims. What we're trying to do, Your
18 Honor, because you know, we -- we appreciate that the
19 Court wants to move the case. We want to move the
20 case and get it resolved as quickly as possible.

21 The index would allow us to identify areas
22 before the record is -- is fully produced where we
23 might have challenges to the sufficiency. So, that we
24 don't have to delay resolution of the case after they
25 produce the full record. We can identify them, within

1 a week. And it would be our deadline to object to
2 things in the index or things that are missing from
3 the index.

4 So, that we could -- we could expedite that
5 process so that when they produce the full record, we
6 will be at a point where we really have the full
7 record and we aren't going to have to delay over
8 issues we raise about the sufficiency of the record.

9 Partial production, rolling production won't
10 allow us to do that 'cause we won't know what they're
11 fretting over. And what parts of --

12 THE COURT: Okay.

13 MR. MASTRO: -- they're, you know, still
14 deciding whether to claim privilege or not on. So, we
15 actually propose this as a way to streamline the
16 process and put the burden on us to state objections
17 sooner.

18 So that when they finally produce the full
19 record on October 20th, which by the way, Your Honor,
20 is a hundred and nineteen days. Almost four full
21 months after we filed the case to great public
22 attention. And a hundred and nine days since it was
23 fully served. It was actually filed on July the 21st.

24

25 So, we suggested that approach. Of course,

1 we're also amenable to receiving a rolling production
2 in the interim since the vast majority of the
3 administrative record is going to be the studies that
4 were done that have already been made publically
5 known. They're not gonna be privileged.

6 The public comments and additional materials
7 put in by the public. All of that should be able to
8 be produced now.

9 Your Honor, they took -- just to put it in
10 some perspective. And as somebody who worked in the
11 Department Of Justice in -- in my career. I know both
12 the burdens and the joys of that experience.

13 Your Honor, they took forty-six days to
14 issue the FONSI. Meaning the final, you know,
15 statement of no environmental impact. And supposedly
16 they found, based on this record, no environmental
17 impact from something they acknowledge a is unique
18 landmark, unicorn in the United States. It never
19 happened before.

20 But they took only forty-six days to issue
21 that finding. They should be able to produce the
22 administrative record in the time frame that -- that
23 we have requested which is much more than the usual
24 sixty days from filing --

25 THE COURT: Okay. Let me -- let me pause

1 there. I want to ask the defense whether the index
2 could be produced by October 6th.

3 MR. CUMMING: I don't believe so, Your
4 Honor, because I think plaintiff's counsel is
5 confusing that -- we couldn't produce an index without
6 having completed a privilege review. Like, I don't
7 know what an index that was -- I don't -- I -- I can't
8 envision a provisional index that would not, you know,
9 have a -- be done after a full privilege view.

10 In other words, I'm not sure what --

11 THE COURT: Okay.

12 (Simultaneous speaking)

13 MR. CUMMING: -- useful that --

14 THE COURT: All right. So, are you custom
15 to producing the index in advance of the
16 administrative record?

17 MR. CUMMING: We -- we can -- we can
18 certainly do that --

19 THE COURT: Is that something that's
20 ordinarily done, I'm asking.

21 MR. CUMMING: It is not ordinarily done.
22 But we are happy to -- we are happy to do so here to
23 try to move things along.

24 THE COURT: By what date? Waiting for the
25 defense to answer that?

1 MR. CUMMING: Your Honor, frankly, I -- I
2 don't know sitting here right now, I need to talk with
3 the agency. We're certainly happy to inform the Court
4 tomorrow. But I -- I can't -- I can't tell the Court
5 that right now.

6 THE COURT: Okay. Listen -- well, let me --
7 let me let Mr. Mastro wrap it up on the administrative
8 record.

9 MR. MASTRO: Certain --

10 THE COURT: So, I'll turn back to him.

11 MR. MASTRO: Certainly, Your Honor. The
12 point of an index, even if they haven't decided for
13 sure whether to claim privilege on every document, in
14 a privilege log you have to identify the document.

15 The index would simply be, you know, what
16 documents are part of the administrative record or
17 that they may be considering, you know, to include in
18 the administrative record. So, we -- we would have
19 that insight.

20 And to expedite the process and -- and I
21 have seen in other cases. I've been involved in --
22 the -- in my earlier career in government where
23 indexes were produced -- usually, the administrative
24 record is produced by the time of the answer which is
25 supposed to occur tomorrow, Your Honor, Friday.

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1 So, you know, I -- we just proposed that to
2 expedite the process here so we don't delay the
3 process on the back end when they produce an
4 administrative record and then we have to raise
5 challenges to it.

6 It actually should be a benefit to the
7 government as well that we're willing to expedite the
8 process for us to have to bring challenges based on an
9 index before they've actually produced the full
10 record.

11 THE COURT: Okay. And is there any
12 particular reason that the plaintiff is seeking
13 production of the full administrative record by
14 October 20th, is -- is there any magic to that date or
15 was it just a date that you thought was eminently
16 reasonable?

17 MR. MASTRO: Your Honor, this goes into the
18 next issue that I'm sure the Court is going to
19 address. Which is how we get the case to
20 resolution --

21 (Simultaneous speaking)

22 THE COURT: --

23 MR. MASTRO: -- dispositive motions. The --
24 the point of that date. That -- that was not our
25 preferred date, Your Honor. We -- we -- we don't

1 understand how they couldn't have produced the
2 administrative record when they found no --

3 THE COURT: Okay. So, you backed into that
4 date by -- because you wanted briefing completed by
5 the end of the year. Is that right?

6 MR. MASTRO: Correct. We would have liked
7 -- we asked for the administrative record in
8 September, Your Honor. But -- but we're left asking
9 for an October date to back in the briefing schedule
10 so that we have the case keyed up for resolution by
11 the end of the year. Where --

12 THE COURT: Okay.

13 MR. MASTRO: -- the district court will have
14 full briefing on cross motions and can decide the case
15 at the end of the year or early next year.

16 THE COURT: Okay. So, suppose the -- either
17 the index or the entire record or both are produced in
18 the month of October. And you have an ambitious
19 briefing schedule where you want launch into the start
20 -- the opening briefs about two weeks later.

21 Suppose you have a dispute about their
22 assertions of privilege. Does that hold up the
23 briefing in your mind?

24 MR. MASTRO: Well, Your Honor, that -- that
25 -- that's what we're trying to avoid with an index

1 which presumably would flag some of these issues. And
2 we have a profound interest on behalf of the State of
3 New Jersey in getting this case resolved by the end of
4 the year or as close to that as possible.

5 What's happening in New York City right now,
6 Your Honor, to be frank about it is, the city and
7 state are rolling ahead with the complete
8 infrastructure for this project.

9 So, at any point in the spring they can
10 flick a switch. I see what they call, you know,
11 gantries which are the machines that -- that sort of
12 pick you off as cars go by for -- for the toll for the
13 congestion pricing tax. They're being put up all over
14 the edge of the zone, right now, as we speak. I see
15 them --

16 THE COURT: Okay. I -- I'm gonna stop you
17 there. But -- so here's -- here's something that you
18 all need to consider. We're an extremely busy court.
19 This is an important case and it will be given its due
20 attention. But we have a lot of competing important
21 cases that affect the public.

22 And so, the notion that briefing will be
23 completed say Christmas Eve and you'll get a decision
24 by New Year's Day is fanciful at best.

25 We have a district judge who needs to -- as

1 -- as -- you're seeking months and months. This is
2 mostly the federal government's assertion for
3 thoughtful briefing. Well, don't you want a
4 thoughtful decision where it's kicked around by a
5 district judge and his staff and cases are read?

6 And -- so, you know, you've got to build in
7 time for the Court to decide this. And what I'm
8 concerned about and I'm mostly concerned what the
9 defense is saying is, you know, the defense is saying,
10 I'm reading and maybe this is a little unfair and they
11 can correct me.

12 But I'm -- I'm getting the tone that well,
13 gee, let everything happen in, you know, in due
14 course, in a thoughtful way and let it unfold and
15 we'll make our privilege determinations. But there's
16 no obligation -- there's no commitment on the back end
17 to not implement these changes in order to allow for
18 an orderly court decision.

19 And you know, at the same time the federal
20 government's saying well, there's no TRO, let's not
21 treat this like a preliminary injunction motion.
22 Well, hello, I think there's going to be if I don't
23 ensure as the case manager that there is time for an
24 orderly decision and not emergent motions.

25 So, you know, you all have to be cognizant

1 of that. I am going to try to protect the Court so
2 that it can make a thoughtful and orderly decision and
3 you give it sufficient time.

4 So, you know, bear that in mind. I'm
5 probably going to run anything, before deciding
6 anything, I'm going to do Judge Martinotti the
7 courtesy of running it by him.

8 But I'm just telling you what I'm going to
9 recommend. And -- and I'm going to recommend that
10 things move along quickly. All right. So --

11 MR. MASTRO: Yes, Your Honor.

12 THE COURT: Okay. Who wants to speak?

13 (Simultaneous speaking)

14 MR. CUMMING: Your Honor, if I could --

15 MR. MASTRO: Your Honor --

16 MR. CUMMING: -- well --

17 MR. MASTRO: -- Randy Mastro.

18 MR. CUMMING: Excuse me -- excuse me, Your
19 Honor --

20 THE COURT: Mr. Mastro, go ahead.

21 MR. MASTRO: Okay. I'll be very brief. I
22 appreciate everything Your Honor said. And what we're
23 trying to do is have a schedule that avoids
24 duplicative motion practice like preliminary
25 injunctions first and then merits briefing. And I of

1 course appreciate the burdens on the Court. That's
2 why we're trying to get the briefing done before
3 Christmas so the Court has time to decide that.

4 I -- I don't expect that would happen by the
5 end of 2023. But sometime early in 2024 so that
6 there's a time for argument and a thoughtful decision
7 and either side having the ability to, you know, have
8 review of that decision.

9 Before this becomes a -- if we just have a
10 laissez-faire approach, the federal government and the
11 -- and New York would like to just see this roll along
12 into the spring and flip the switch, we'll be ready to
13 go.

14 THE COURT: Okay. All right. Let -- let's
15 hear from the defense.

16 MR. CUMMING: Thank you, Your Honor. I -- I
17 do think there are a few inaccuracies I'd like to
18 correct. I mean, Mr. Mastro's assertion that the
19 switch will be flipped is not -- you know, it makes it
20 sound like this is going to be a secretive process.

21 As we laid out in our letter, there are a
22 number of state administrative processes and some
23 additional processes that need to happen before the
24 tolls will go into effect.

25 The current time line as I understand it is

1 May, but that date may move. We're certainly happy to
2 update the Court. But there are state administrative
3 ruling makings that need to happen. There's a
4 finalization of an agreement between the federal
5 government and the state of New York.

6 All those things need to happen. And the
7 state process will be public with notice and a full
8 state administrative process.

9 So, the idea that this is going to sneak up
10 on the public or plaintiff is simply inaccurate.

11 THE COURT: Well, they want a decision
12 before the decision is made for them by the passage of
13 time. Right?

14 MR. MASTRO: Your Honor, I don't --

15 THE COURT: And without a commitment from
16 the federal government to, you know, not implement the
17 congestion pricing until, you know, a date certain in
18 order to allow the Court to -- to issue its decision.

19 You're going to have a nervous plaintiff.
20 That's inevitable.

21 MR. CUMMING: I understand that, Your Honor,
22 and we -- we currently want to give the Court
23 sufficient time. But we do strongly feel that
24 plaintiff's briefing schedule will not give the Court
25 what it needs.

1 I mean, I will propose an alternative here,
2 an orderly schedule for plaintiffs to brief our
3 preliminary injunction motion which seems like what
4 they want.

5 THE COURT: Well, no, I don't think that's
6 what they want. Because why -- why decide the
7 likelihood of success on the merits rather than
8 deciding the merits? They're trying to get a decision
9 on the merits. And I think everybody would be best
10 served by that. And there seems to be enough time.

11 I mean, in most cases I have a discovery
12 period that has to be completed before you can have
13 summary judgment motion. Here we don't have that.
14 So, you can go right into the summary judgment
15 briefing and have the merits decided.

16 MR. CUMMING: One other point, Your Honor,
17 I'll note is that in plaintiffs -- plaintiffs -- what
18 plaintiffs are seeking to do in this lawsuit is to
19 enjoin Federal Highway's Administ -- environmental
20 assessment and a finding of no significant impact.

21 I mean, this law suit -- the state process
22 can continue. And everything up to the agreement
23 between the federal government and the state can
24 continue.

25 But, you know, stopping the gantries going

1 on, that -- that's not a remedy that plaintiff can get
2 through this lawsuit.

3 THE COURT: Okay.

4 MR. MASTRO: That's -- that's not --

5 THE COURT: So let's just go back. All
6 right. So, I am heavily inclined to -- to order an
7 October completion date for production of the
8 administrative record. I -- I realize that it can be
9 cumbersome and time consuming to make privilege
10 determinations. But this is a case of public
11 interest, there's been plenty of time and you had to
12 apply more resources to get it done soon and I mean in
13 October.

14 I'm not going to pick a date now. I'm just
15 telling you that's what you should expect. If I have
16 to rule on it, I'm going to give you another chance to
17 talk to one another about an index and a deadline for
18 production of the complete administrative record.

19 But I like to give you a hint of where its
20 likely to come out if you don't agree.

21 And then on the briefing. You know, the --
22 the only thing I would say is, you know, I'll -- I'll
23 hear you on the schedule and how much time is needed.
24 But I personally, and I will have to run this by Judge
25 Martinotti, I think when you have simultaneous cross

1 motions, the briefing is very confusing.

2 I -- you know, if a -- if cross motions are
3 going to be briefed for me to decide, and -- and they
4 won't be decided by me in this case, I like four
5 rounds of briefing, so that one brief responds to the
6 other, rather than you get a lot of repetition and
7 ships crossing in the night when you have simultaneous
8 briefing.

9 So, that's my preference. I'll talk with
10 Judge Martinotti about whether he has a preference on
11 that. But, you know, if you did agree to four rounds
12 of briefing, you know, and -- and you seemed
13 harmonious about it, if it looked reasonable, Judge
14 Martinotti would probably -- I would guess he would be
15 okay with it.

16 And then, you know, if it's not briefed by
17 the end of the year, I don't think there's any -- that
18 affects the -- the date by which its decided. If it's
19 more comfortable to -- to brief it and you know, have
20 the closing briefs in January, you know, that's --
21 that's probably reasonable.

22 So, those are -- those are my -- that's my
23 prognosticating how it may turn out. But I like to
24 give -- it's always better when -- when counsel are
25 able to decide their own schedule.

1 MR. MASTRO: Yeah, I --

2 THE COURT: Okay.

3 MR. MASTRO: Yeah. Your Honor, Randy
4 Mastro, if I could just briefly be heard on that last
5 point.

6 THE COURT: Sure.

7 MR. MASTRO: The -- the -- the issue -- the
8 issue about cross motions versus, you know, four
9 rounds of briefing. Of course, the issue becomes
10 there then who has the last word. And --

11 THE COURT: Four rounds of briefing,
12 everyone gets a reply brief on their -- their motion.
13 What's the difference?

14 MR. MASTRO: Well, your -- Your Honor,
15 that's -- that's -- that's -- that is -- the -- what
16 one -- the -- the point of cross briefing as opposed
17 to you know, four rounds of briefing, that -- that --
18 that actually, you know, potentially on -- on their
19 motion, you know when they -- when they move -- if
20 they were to move after us, the question becomes who
21 has to move first, right.

22 And if they move after us, they do get the
23 last word because they have the last reply.

24 THE COURT: Well, then maybe ask for a
25 surreply if something is inserted in -- in the last

1 brief and it's unfair, it's raised for the first time.
2 But don't -- don't get hung up on that. We don't get
3 hung up on that down here.

4 MR. MASTRO: Right. But what -- what we
5 were trying to do is, with cross motions and cross
6 oppositions and then, if there's a need for either
7 side to reply, the Court can grant permission for
8 that.

9 So, we were actually trying to -- to reduce
10 it to two rounds of briefing and the potential for
11 either side to apply to the Court to do a reply on
12 newly raised issues to avoid confusion.

13 THE COURT: All right. Well --

14 MR. MASTRO: And --

15 THE COURT: -- I -- I think that it's --
16 it's -- I think, and it's subject to what Judge
17 Martinotti thinks. It's more important that the
18 briefing is digestible and understandable for the
19 Court than that one party gets the last word. Because
20 the last word can always be altered whether it be by
21 surreply or oral argument or what have you. So, I'm
22 just suggesting that you're not to get too hung up on
23 that.

24 MR. MASTRO: I -- I -- I understand
25 completely, Your Honor. I'm just saying that what

1 we're trying to propose is two rounds and maybe a
2 third as opposed to four rounds. In their schedule it
3 would take us to March.

4 THE COURT: All right. I'll let you guys
5 discuss that.

6 MR. MASTRO: Right. Thank you, Your Honor.

7 THE COURT: All right. So, get me a letter
8 if you would by -- by early next week and I'll take it
9 from there. Get a joint letter in. I'd like a joint
10 letter. You're supposed to confer.

11 MR. MASTRO: Thank you.

12 THE COURT: If you can't coordinate on that
13 then we're -- we have a big problem.

14 MR. MASTRO: Really appreciate the Court's
15 time. Thank you so much.

16 THE COURT: Okay. Likewise. Thank you.
17 Bye bye.

18 UNIDENTIFIED FEMALE: Thank you, Your Honor.

19 MR. CUMMING: Thank you, Your Honor.

20 (Conclusion of proceedings)

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Certification

I, Eileen M. Zakrzewski, Transcriptionist, do hereby certify that the 28 pages contained herein constitute a full, true, and accurate transcript from the official electronic recording of the proceedings had in the above-entitled matter; that research was performed on the spelling of proper names and utilizing the information provided, but that in many cases the spellings were educated guesses; that the transcript was prepared by me or under my direction and was done to the best of my skill and ability.

I further certify that I am in no way related to any of the parties hereto nor am I in any way interested in the outcome hereof.

/s/Eileen M. Zakrzewski
Signature of Approved Transcriber

October 31, 2023
Date

KING TRANSCRIPTION SERVICES, LLC
3 South Corporate Drive, Suite 203
Riverdale, NJ 07457
(973)237-6080